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No. 98-15730

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

DONALD WASHINGTON, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-15730

THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

DONALD WASHINGTON, JR., *Respondent.*

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WASHINGTON, JR., Petitioner-Appellant, v.	No. 98-15730 DC No. CV-97-02316-CRB
STEVE CAMBRA, Respondent-Appellee.	OPINION

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Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
June 14, 1999--San Francisco, California

Filed April 14, 2000

Before: Mary M. Schroeder, Betty B. Fletcher, and Robert Boochever, Circuit Judges.

Opinion by Judge B. Fletcher

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that on federal habeas corpus, review is not precluded by procedural default in asserting state-court remedies when the underlying state rule necessarily requires the state appellate court to address fundamental constitutional claims.

Following California convictions, appellant Donald Washington sought habeas corpus relief in the California Supreme Court. He alleged that his right to a fair trial was violated when the trial court allowed his jury to see him in court restrained by manacles, and the State improperly relied on his post-*Miranda* silence as evidence of his sanity.

Citing two of its own precedents (*Swain* and *Dixon*), the California Supreme Court summarily denied Washington's petition.

Swain held that a state habeas petitioner who belatedly presents a collateral attack must explain the delay in raising the issue. In *Dixon*, the California Supreme Court held that in the absence of special circumstances constituting an excuse for failing to employ direct review, habeas corpus is unavailable when the claimed errors could have been raised in a timely appeal.

Washington filed a federal habeas corpus petition raising the same claims he asserted in his state habeas petition. The district court granted the State's motion to dismiss under the procedural default rules of *Swain* and *Dixon*.

The court of appeals granted a certificate of appealability on the issue of whether *Swain* and *Dixon* were regularly applied by the California Supreme Court in 1994, when Washington made his direct appeal to the California Court of Appeal.

[1] Because Washington's federal habeas petition raised the same claims as his state petition, he procedurally defaulted on those claims only if *Swain* and *Dixon* provided adequate and independent state grounds for the California Supreme Court's decision. The court of appeals could reverse the dismissal if either the *Swain* and *Dixon* procedural bars was not adequate and independent. This was so because California invoked both rules without specifying which applied to which of Washington's two claims.

[2] The *Dixon* rule does not provide an independent statelaw basis for denying a habeas petition that raises fundamental constitutional errors. For a state procedural rule to be independent, the state-law ground for decision must not be interwoven with federal law. Because a fundamental constitutional error qualified as an exception to both the *Swain* and *Dixon* rules under state law, the California Supreme Court necessarily addressed fundamental constitutional claims when applying the *Dixon* rule. Thus, the *Dixon* rule was not independent of federal law, and does not preclude federal habeas review when the petitioner asserts the denial of a federal constitutional right.

[3] Both of Washington's claims involved allegations of constitutional error. He therefore could not be held to have procedurally defaulted under *Dixon*.

COUNSEL

John J. Jordan, San Francisco, California, for the petitioner-appellant.

Christopher W. Grove, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge:

Petitioner Donald Washington appeals from the district court's dismissal of his federal habeas petition on grounds of procedural default. We granted a certificate of appealability on the question whether, in 1994, the California Supreme Court regularly and consistently applied the procedural bar rules established in *In re Swain*, (Cal. 1953). After the parties submitted their briefs in this case, the Ninth Circuit decided *Park v. California*, No. 96-56750, __ F.3d __, 2000 WL 44133 (9th Cir. Jan. 21, 2000), holding that *Dixon* did not provide an independent state law basis for denying federal constitutional claims. We have jurisdiction pursuant to 28 U.S.C. § 2253(c). Following *Park*, we reverse the district court's dismissal of Washington's federal habeas petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial, Washington was convicted of battery on a correctional officer, resisting arrest, ad assault by force likely to produce great bodily injury. Washington filed a direct appeal with the California Court of Appeal, raising issues related to his sentencing and his request for substitute counsel. On August 19, 1994, the California Court of Appeal affirmed

Washington's conviction but remanded the case for re-sentencing.

Washington did not pursue a direct appeal to the California Supreme Court. He did, however, file a pro se petition seeking a writ of habeas corpus. The petition in that court made two claims: (1) that his right to a fair trial was violated when the jury saw him in court in waist chains, manacles, and leg irons; and (2) that the government improperly used his post-*Miranda* silence as evidence of his sanity. On May 28, 1997, the California Supreme Court denied Washington's petition in a two-line disposition: "Petition for writ of habeas corpus DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 204; *In re Dixon* (1953) 41 Cal.2d 756, 759)."

Shortly thereafter, Washington filed a pro se habeas petition in federal district court asserting the same claims he made in the state petition. The state moved to dismiss under *Swain* and *Dixon* on grounds of procedural default. The district court granted the motion and we subsequently granted a certificate of appealability on the question whether *Swain* and *Dixon* were regularly and consistently applied by the California Supreme Court in 1994, the year Washington made his direct appeal tot he California Court of Appeal.

II. STANDARD OF REVIEW

We review de novo a district court's dismissal of a petition for writ of habeas corpus on grounds of state procedural default. *See Fields v. Calderon*, 125 F.3d 757, 759-60 (9th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998).

III. DISCUSSION

In *Swain*, the California Supreme Court held that a state habeas petitioner who "belatedly presents a collateral attack . . . [must] explain the delay in raising the question." 209 P.2d at 795. The *Swain* rule is commonly referred to as the "untimeliness" bar. *See In re Robbins*, 959 P.2d 311, 340 n.34

(Cal. 1998). In *Dixon*, the California Supreme Court held that "in the absence of special circumstances constituting an excuse for failure to employ [the] remedy of [of direct review], the writ will not lie where the claims errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." 264 P.2d at 514. The *Dixon* and *Swain* rules are "separate and distinct" procedural bars. *Park*, 200 WL 44133, at *5 n.3.

[1] Because Washington's federal habeas petition raises the same claims as his state petition, he has procedurally defaulted on those claims only if *Swain* and *Dixon* "provide[] adequate and independent state grounds for the California Supreme Court's decision." *Fields*, 125 F.3d at 760. In examining the *Swain* and *Dixon* procedural bars, we may reverse the dismissal if either rule is not adequate and independent. This is so because the California Supreme Court invoked both rules without specifying which rule applied to which of Washington's two claims. *See Calderon v. Bean*, 96 F.3d 1126, 1131 (9th Cir. 1996) (state procedural default no bar to federal review where state court's order did not specify which rule applied to which claims); *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996) ("[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review") (citing *Siripongs v. Calderon*, 35 F.3d 1308, 1317-18 (9th Cir. 1994)).

[2] In *Park*, we held that the *Dixon* rule does not provide an "independent" state law basis for denying a habeas petition (filed before *In re Robbins*) which raises fundamental constitutional errors. We reasoned that "[f]or a state procedural rule to be `independent,' the state law ground for decision must be `interwoven with the federal law.'" 2000 WL 44133, at *6 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), and citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)). Because a "fundamental constitutional error" qualified as an exception to

both the *Dixon* and *Swain* rules under state law,[1] we concluded that the California Supreme Court "necessarily addressed fundamental constitutional claims when applying the *Dixon* rule." *Id.* at *6. Thus the *Dixon* rule is not independent of federal law and does not preclude federal habeas review where the petitioner asserts the denial of a federal constitutional right. *Id.* at *6-7. This is so regardless of the answer to the question we certified here (whether the *Dixon* rule was regularly and consistently applied in 1994).

[3] Both of Washington's claims involve allegations of constitutional error. First Washington contends that his rights to due process and a fair trial were violated when the jury was allowed to see him in waist chains, manacles, and leg irons. *See Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989) ("Generally, a criminal defendant has a constitutional right to appeal before a jury free of shackles."); *see also Illinois v. Allen*, 297 U.S. 337, 344 (1970) (shackles may be used only as a "last resort"). Second, Washington contends that the prosecutor violated his due process rights by referring to his post-*Miranda* silence as evidence of his sanity. *See Wainright v. Greenfield*, 474 U.S. 284 (1986); *cf. People of Guam v. A.C. Cruz*, 70 F.3d 1090, 1092-93 (9th Cir. 1995). Therefore, he cannot be held to have procedurally defaulted under *Dixon*.

REVERSED AND REMANDED.

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1. *See Park*, 2000 WL 44133, at *5 and n.3 (noting similarity of exceptions to the *Swain* and *Dixon* rules set forth in *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993)).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed March 16, 1998]

DONALD WASHINGTON, JR., Petitioner,	) No. C 97-2316 CRB (PR)
vs.	)
STEVEN CAMBRA, JR., Warden Respondent.	) ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a state prisoner currently incarcerated at Pelican Bay State Prison in Crescent City, California, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, the petition is dismissed.

BACKGROUND

Petitioner was convicted by a jury in Del Norte County Superior Court of battery by an inmate on a correctional officer, resisting arrest and assault likely to produce great bodily injury. The jury also found true two prior serious felony convictions. On or about June 13, 1993, he was sentenced to a term of four years to be served consecutively with the sentence he already was serving in state prison. Petitioner appealed his conviction and sentence to the California Court of Appeal, which affirmed the judgment of conviction and remanded the matter for resentencing. See People v. Washington, 27

Cal.App.4th 940 (1994). Petitioner did not seek review from the Supreme Court of California.

Petitioner sought collateral relief from the California state courts several years later. On May 28, 1997, the Supreme Court of California summarily denied a petition raising the same claims raised herein. Petitioner filed the instant federal petition shortly thereafter.

Per order filed on August 8, 1997, the court found that the petition, liberally construed, stated two cognizable claims under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent instead moves for dismissal of the petition on the ground that the claims are procedurally defaulted.

DISCUSSION

The procedural default doctrine forecloses federal review of a state prisoner's federal habeas claims if those claims were defaulted on in state court pursuant to an independent and adequate state procedural rule. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). To find procedural default, a federal court must determine that the state court explicitly invoked a state procedural bar as an independent bar as an independent basis for its decision, see id. at 735; McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995), and that the state procedural bar cited was clear, consistently applied and well-established at the time of the petitioner's purported default, see Calderon v. United States Dist. Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996), cert. denied, 117 S.Ct. 1569 (1997).

Petitioner first presented his federal claims to the Supreme Court of California in a petition for a writ of habeas corpus filed on March 31, 1997, nearly three years after his direct appeal became final. The petition was denied on May 28

1997 in an order citing In re Swain, 34 Cal.2d 300, 304 (1949), and In re Dixon, 41 Cal.2d 756, 759 (1953).[1]/

In re Swain articulates the procedural requirements that a California habeas petitioner allege with particularity the facts supporting his claims and explain and justify any delay in the presentation of the claims. See 34 Cal.2d at 304. The court has reviewed the petition that petitioner submitted to the Supreme Court of California and finds that he presented his claims with sufficient particularity;[2]/ however, the denial of the petition with a citation to In re Swain still constitutes an independent state procedural denial for untimeliness. See Allard v. Olivarez, No. C 97-1009 FMS (PR), 1998 WL 19468, at *2 (N.D. Cal. Jan. 12, 1998) (denial under In re Swain where claims presented with particularity is independent denial for untimeliness); LaFlamme v. White, No. C 96-1696 VRW, 1997 WL 488358, at *1 (N.D. Cal. Aug. 13, 1997) (same).

The Supreme Court of California also cited In re Dixon in support of its denial of the petition. In re Dixon stands for the state rule that habeas corpus "cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." 41 Cal.2d at 759. The citation to In re Dixon constitutes an additional independent state ground sufficient to bar federal review. See Odle v. Calderon, 884 F. Supp. 1404,

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1. The May 28, 1997 order states: "Petition for writ of habeas corpus is DENIED. (See In re Swain (1949) 34 Cal.2d 300, 304; In re Dixon (1953) 41 Cal.2d 756, 759.)."

2. See Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986) (federal court may independently exaine petition presented to state court to determine whether claims were faily presented and properly exhausted).

1413 (N.D. Cala. 1995) (denial of petition with citation to In re Dixon constitutes denial on independent state ground).

Whether the state procedural bars cited were consistently applied and well-established at the time of petitioner's purported default is not as clear, however. The Supreme Court of California noted in July 1993 that "the application of its rules governing habeas petitions had become irregular and inconsistent." See Fields v. Calderon, 125 F.3d 757, 763 (9th Cir. 1997) (citing In re Clark, 5 Cal.4th 750, 763 (1993)); (citing In re Harris, 5 Cal.4th 813 (1993) (accompanying opinion to In re Clark). Procedural defaults that occurred before In re Clark and In re Harris therefore generally have been found inadequate. See, e.g., Fields, 125 F.3d at 761-65; Bean, 96 F.3d at 1129-31; Morales v. Calderon, 85 F.3d 1387, 1390-93 (9th Cir.), cert. denied, 117 S.Ct. 500 (1996); Siripongs v. Calderon, 35 F.3d 1308, 1318, 1318 (9th Cir. 1994); cert. denied, 115 S.Ct. 1175 (1995); Odle, 884 F. Supp. at 1413-14.

In re Clark and In re Harris intended to reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions. See Fields, 125 F.3d at 763-64. Procedural defaults that occurred after In re Clark and In re Harris, as is the case here, therefore may be adequate to bar federal review. See Siripongs, 35 F.3d at 1318.[3]/ Respondent in fact submits that since In re Clark and In re Harris the state's procedural rules at issue here have been regularly and consistently applied. In support, he noted that the one published opinion to examine the adequacy

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3. The proper date for determining whether a procedural rule was firmly established and regularly followed is the time of the purported default or, stated differently, the time the claim should have been raised. Here, that time is when petitioner's direct appeal became final in 1994. See Fields, 125 F.3d at 760-61.

of California's bars after In re Clark and In re Harris concluded that they have been applied regularly and consistently. See Deere v. Calderon, 890 F. Supp. 893, 899-901 (C.D. Cal. 1995). Petitioner submits no evidence to the contrary.

In re Clark and In re Harris put petitioners on notice that previously established state procedural rules and standards would be followed regularly and consistently in the future. Deere accordingly examined the practices of the Supreme Court of California since In re Clark and In re Harris, and concluded that the court indeed had applied its timeliness bar regularly and consistently. See Deere, 890 F. Supp. at 899-901, 905-08. It also concluded that this justified honoring other bars such as that of In re Dixon. See id. at 901. Although Deere examined a relatively small number of state capital habeas petitions, its findings suggest that the Supreme Court of California has made good on its promise to apply its bars regularly and consistently to all state habeas petitions. In view of Deere and the lack of any evidence to the contrary, the court finds that the bars invoked by the Supreme Court of California here were consistently applied and well-established at the time of petitioner's purported default and therefore constitute adequate and independent state procedural rules barring review of petitioner's federal claims. See Wood v. Hall, 130 F.3d 373, 376-78 (9th Cir. 1997) (honoring Oregon fugitive disentitlement rule because petitioner did not present sufficient evidence that application of rule was unprincipled, arbitrary or standardless); Forrest v. Vasquez, 75 F.3d 562, 564 (9th Cir. 1996) (honoring California's rule barring untimely petitions for review to Supreme Court of California because "[t]here is nothing to indicate that [it] is not firmly established and consistently applied").[4]

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4. Accord Allard, 1998 WL 19468, at **2-3 (finding timeliness bar was adequate in 1994 in view of Deere and lack of any evidence to the contrary).

Petitioner's procedural default may be excused if he can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law, or (2) that failure to consider his claims will result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner does not attempt to make any such showing, however.[5]/

CONCLUSION

For the foregoing reasons, petitioner's claims are procedurally defaulted and respondent's motion to dismiss the petition is GRANTED.

SO ORDERED.

DATED: 3-16-98

CHARLES R. BREYER
United States District Judge

5. Nor is there any indication in the record that he could make such a showing.

APPENDIX C

S060085

IN THE SUPREME COURT OF CALIFORNIA

[Filed May 28, 1997]

IN RE DONALD WASHINGTON

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 204, *In re Dixon* (1953) 41 Cal.2d 756, 759.)

_____

Chief Justice

APPENDIX D

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

[Filed Aug 19, 1994]

THE PEOPLE,

Plaintiff and Respondent,

v.

A062150
(Del Norte County
Super. Ct. No. 92-342-X)

DONALD WASHINGTON,

Defendant and Appellant./

Donald Washington, an inmate at Pelican Bay State Prison, appeals from his convictions of battery by an inmate on a non-inmate (Pen. Code, § 4501.5), resisting arrest (Pen. Code, § 148) and assault likely to produce great bodily injury (Pen. Code, § 245). Washington contends (1) that he was deprived of his right to a Marsden hearing (People v. Marsden (1970) 2 Cal.3d 118), and (2) that the court committed sentencing error. We will affirm Washington's conviction, but will remand the matter to the superior court for re-sentencing.

The charges against Washington arose from an alleged attack by him on Correctional Officer Michael Randolph. It was further alleged that Washington previously had been convicted of two serious felonies: murder and assault by an inmate on a non-inmate. Washington entered pleas of not guilty and not guilty by reason of insanity. His trial was trifurcated. Following the first phase, the jury determined that

Washington had in fact committed the charged offenses. Following the second phase, the jury returned a verdict that Washington was sane at the time he committed the offenses. At the third and final phase, the jury returned a verdict finding the enhancing allegations to be true. Washington moved for a new trial. The trial judge, Judge Nelson, however, was not available at the time of the hearing on Washington's motion; a second judge, accordingly, presided at the hearing. As relevant to the issues raised here, Washington, expressing anger that the trial judge was not present, also claimed that he was dismissing his attorney.[1]/

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1. A transcript of the hearing discloses the following:

"THE COURT: Case 92-342-X--

"DEFENDANT WASHINGTON: You want the judge of record? The judge was George L. Nelson. You wasn't the judge of record.

"THE COURT: Okay. We'll call the People of the State of California vs. Donald Washington. Mr. Washington is here with his attorney, Mr. Levy.

"DEFENDANT WASHINGTON: He ain't my attorney. I'm dismissing him right now.

"THE COURT: This matter is on for a motion for a new trial, which should probably be heard by the trial judge, who was Judge Weir.

"DEFENDANT WASHINGTON: No, Judge Weir wasn't the judge.

"THE COURT: Excuse me. It's much preferred if the matter be heard by the trial judge. But your position on that, Mr. Levy?

"DEFENDANT WASHINGTON: I'm

The court put the matter over for a day to determine the schedule of Judge Nelson. The following day, the court suggested that the matter be continued for approximately two weeks until Judge Nelson returned. The court and parties discussed a number of issues, including Washington's competence, and what his attorney viewed as an attempt by Washington to make a Marsden motion. The court, among other things, concluded that Washington wanted to make a Marsden motion but ultimately rules that all matters should be deferred until the return of Judge Nelson.[2], [3]

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dismissing all this shit today. I'm going pro per. Here you go, right here. That's my motion right here." (Emphasis added.)

2. A transcript of this hearing discloses the following: "THE COURT: So my judgement of wisdom this afternoon, that I'm going to defer all matters to Judge Nelson, now that we know that he will be here on the 4th. Now, this motion has been filed. I'm comfortable with the thought that given yesterday's requests, which included the specific request that Judge Nelson to be the one to dear with things, and the filing of this motion, that the sentence time table is interrupted. And so--I don't now see the minutes yet from yesterday. But I fully do intend to recognize the Marsden Motion. I want the record to reflect that so it will be dealt with by Judge Nelson." (Emphasis added.)

3. We accept the court's conclusion that Washington in fact was attempting to make a Marsden motion, rather than requesting that he be permitted to represent himself under Faretta v. California (1975) 422 U.S. 806. A Faretta motion would have been untimely, although the court in its discretion nonetheless might have entertained it. (People v. Windham (1977) 19 Cal.3d 121, 128.) If the motion were deemed a Faretta motion, our review of it would be limited to

Judge Nelson, however, did not deal with the Marsden motion. Indeed, it appears that Judge Nelson was not aware that such a motion might be pending; believing, rather, that it either had been dropped or had been resolved in his absence. Thus, at the hearing on Washington's motion for a new trial, defense counsel told the judge that at the previous hearings "there was an outburst from Mr. Washington. I believe he was attempting to make a Marsden Motion and also served some papers on the court regarding his own pro per motion." Counsel cited those facts not in order to obtain a Marsden hearing, but in support of his request for further competency proceedings be initiated. The court denied the motion for new trial and motion to commence competency proceedings. Neither Washington, nor his attorney, nor any other person, indicated that Washington still wished to dismiss his attorney.

Discussion

The Attorney General argues that the failure of either defense counsel or Washington himself to renew the matter before Judge Nelson should be taken as a waiver of any right to a Marsden hearing. The record does not indicate both that Washington's dissatisfaction with his attorney was transitory, and that Washington was and is quite capable of manipulating the situation so as to provide grounds for a later claim of error.[4/] Concluding that any error was harmless in all

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determining whether the error was harmless under People v. Watson (1956) 45 Cal.2d 818, 836. (People v. Rivers (1993) 20 Cal.App.4th 1040, 1050.) On this record, any error was patently harmless.

4. In denying Washington's motin to commence additional competency proceedings the trial judge stated: "It's the Court's opinion that Mr. Washington is well aware of the

events, we need not here determine whether the duty of the trial court to consider a Marsden motion exists even where the court is unaware that such a motion is pending, or whether a defendant who has once raised the matter waives any error by failing to raise it again before a different judge.

Marsden does not establish a rule of per se reversible error. (People v. Chavez (1980) 26 Cal.3d 334, 348-349.) Washington had made no showing here either that his Marsden motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted. The failure to rule on the motion did not affect Washington's trial in any way. The motion was made only after he had been convicted. The basis for such a motion at such a time could have been only that his attorney had acted incompetently at trial or in filing the motion for new trial (see, generally, People v. Smith (1993) 6 Cal.4th 684, 693) or, possibly, that Washington believed that counsel would be unable to represent him properly at sentencing. The fact that no Marsden motion was entertained does not preclude Washington from attacking the competency of his attorney. Indeed, we have reviewed counsel's actions under the standards stated in People v. Babbitt (1988) 45 Cal.3d 660, 707, and conclude that no grounds for claiming ineffective assistance of counsel exist. Washington was ably represented and the evidence against him was nothing less than overwhelming. We cannot see how the appointment of a different attorney would have gained Washington a new trial, or could have had any effect on the sentence imposed, and we, of course, are able to review

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proceedings that are going on before the Court, I have observed his behavior, is quite rational, quite observant, and is quite well aware of what's going on. He is also very manipulative and has learned how to manipulate people who are in charge of him, including the court, and that these actions are the result of that desire to manipulate."

Washington's claims that the sentence imposed was improper. We therefore conclude that the failure to consider the purported Marsden motion has not deprived Washington of any arguments or otherwise irrevocably affected the verdict or sentence. Under the circumstances, and on the record before us, we cannot see that Washington would have obtained a result more favorable to him had the motion been entertained.

Sentencing Error

This was Washington's second conviction of battery by an inmate upon a non-inmate, an offense punishable by a term of two, three, or four years. (Pen. Code, § 4501.5.) He had been convicted of the same offense in 1986 and, at that time, had been sentenced to a term of two years, to be served consecutively to the sentence he was then serving. The court here sentenced Washington to another consecutive term of four years. The Third Division of this court, in People v. Venegas (1994) 25 Cal.App.4th 1731, 1742-1744, recently held that such a sentence violates Penal Code section 1170.1, subdivisions (a) and (c), providing as relevant, that where the sentences for "new offenses" are to be served consecutively, the greatest term of imprisonment will be selected as the principal term, the other or others will be the subordinate term or terms, and such subordinate term or terms shall consist of one-third of the statutory middle term.[5/] For the reasons stated by the Third Division, the sentence imposed here was error. The superior court should have designated the sentence on the current offense as the principal term, and reimposed the 1986 sentence as a subordinate term of one-third the midterm.

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5. In People v. Perez (Sept. 3, 1993) A057239, decided by this division, we essentially adopted the same analysis used by the Third Division in Venegas. Review in that case was dismissed on May 12, 1994.

The judgment is affirmed. The matter is remanded to the superior court for re-sentencing in accordance with our opinion. The superior court further is ordered to forward a corrected abstract of judgment to the Department of Corrections.

CERTIFIED FOR PUBLICATION.

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Stein, J.

WE CONCUR:

_____

Newsom, Acting P.J.

_____

Dossee, J.

(P. v. Washington - A062150)